TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~[illegible]~~ 180.

THE UNITED STATES, APPELLANT,

vs.

DONN C. MITCHELL.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 11, 1906.

(20043.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 541.

THE UNITED STATES, APPELLANT,

vs.

DONN C. MITCHELL.

APPEAL FROM THE COURT OF CLAIMS.

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16723—06

1 In the Court of Claims.

DONN C. MITCHELL
vs.
THE UNITED STATES. } No. 24371.

I.—Petition. Filed November 6, 1903.

To the honorable the Court of Claims:

The claimant above named respectfully represents:

I. That he was enrolled in the military service of the United States as first lieutenant in Troop E, First Regiment, Ohio Cavalry Volunteers, on the 9th day of May, 1898, and served honestly and faithfully within the limits of the United States until honorably discharged and mustered out with his regiment on the 22d day of October, 1898.

II. That on the 14th day of September a furlough of one month for said regiment was authorized under General Orders 130, A. G. O., 1898, and amendatory circulars, but the claimant did not receive such furlough but was detained for military duty and actually performed such duty during the furlough period under the orders of his superior officers. That he had been assigned by special orders as captain of Troop E, from August 24, 1898, and was paid as such to date of muster out.

III. That on account of the failure of claimant to receive the
2 benefit of such furlough he became entitled to one month's extra pay under the acts of January 12, 1899 (30 Stat. L., 784), and May 26, 1900 (31 Stat. L., 217).

IV. That this claim has been disallowed by the Auditor for the War Department on the ground that the records of the War Department fail to show any duty performed by claimant during the furlough.

V. That no other action than as aforesaid has been had on this claim in Congress or by any of the Departments; that the claimant is the sole owner of this claim and the only person interested therein; that no assignment or transfer of this claim, or any part thereof or interest therein, has been made; that the claimant is justly entitled to the amount claimed from the United States, after allowing all just credits and offsets; that the claimant is a citizen of the United States. And the claimant believes the facts as stated in this petition to be true.

And the claimant prays judgment for $166.66.

GEORGE A. & WILLIAM B. KING,
Attorneys of Record.

DISTRICT OF COLUMBIA, *ss:*

Wm. B. King, being duly sworn, deposes and says that he is one of the attorneys for the claimant; that he has read the above petition; and that the matters therein stated are true to the best of his information and belief.

WM. B. KING.

Subscribed and sworn to before me this 4th day of November, 1903.

[SEAL.] MARIE A. SEARLES,
Notary Public.

3 II.—Traverse. Filed November 14, 1905.

In the Court of Claims of the United States, December term, A. D. 1905.

DONN C. MITCHELL
vs. } No. 24371.
THE UNITED STATES.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. PRADT,
Assistant Attorney-General.

4 III.—Argument and Submission.

This case was argued by Mr. McKercher and Mr. William B. King for the claimant and by Mr. Anderson for the defendants and submitted on the 14th day of November, 1905.

5 IV.—Findings of Fact and Conclusions of Law and Opinion of the Court. Filed December 18, 1905.

DONN C. MITCHELL *v.* THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The claimant, Donn C. Mitchell, was enrolled in the Volunteer Army, during the Spanish war, as second lieutenant of Troop E, First Ohio Volunteer Cavalry, on the 3d day of May, 1898. He served in the grade of second lieutenant until promoted to first lieutenant October 20, 1898. He was mustered out as first lieutenant October 23, 1898. His entire service was within the limits of the United States.

II.

While on duty as second lieutenant of the First Ohio Volunteer Cavalry at Huntsville, Ala., during the Spanish war, claimant received the following order:

"HEADQUARTERS 1ST OHIO VOLUNTEER CAVALRY,
"*Camp Wheeler, Huntsville, Ala., August 24, 1898.*

"Special Orders, }
"No. 44. }

"I. 1st Lieut. William D. Forsyth, 1st Ohio Volunteer Cavalry, having been ordered before a board for examination for appointment as

second lieutenant in the Regular Army, is hereby relieved of the command of Troop E. He will turn over the property, funds, and records of the troop to his successor.

6 "II. 2d Lieut. Donn C. Mitchell, 1st Ohio Volunteer Cavalry, is hereby appointed to the command of Troop E. He will receipt to Lieut. Forsyth for the property and funds pertaining to the troop.

"By order of Lieut. Col. Day:

(Signed) "A. C. RODGERS,
"*Captain and Regtl. Adj. 1st Ohio Vol. Cav.*"

This order was approved by the commanding general in the field in the following orders:

"HEADQUARTERS FOURTH ARMY CORPS,
"*Camp Wheeler, Huntsville, Ala., September 2, 1898.*

"Special Orders,
"No. 97.

* * * * * * *

"II. It appearing from evidence that the following-named officers of the First Ohio Volunteer Cavalry have exercised the functions of commanders above that pertaining to the grades held by them from and after the dates set opposite their respective names, the assignment thereto contemplated by General Orders, No. 86, current series, Adjutant-General's Office, is confirmed, namely:

* * * * * * *

"2d Lieut. Donn C. Mitchell, as captain, from August 24th, 1898.

* * * * * * *

"By command of Major-General Coppinger:

(Signed) "CLARENCE K. EDWARDS,
"*Assistant Adjutant-General.*"

Under these orders claimant exercised command of Troop E from August 26, 1898, to October 23, 1898, when he was mustered out with his regiment.

So much of G. O. No. 86, A. G. O., of 1898, as relates to the matter of pay for exercising a higher command, is as follows:

"General Orders,
"No. 86.

"HEADQUARTERS OF THE ARMY,
"ADJUTANT-GENERAL'S OFFICE,
"*Washington, July 2, 1898.*

"I. In section 7 of the act 'For the better organization of the line of the Army of the United States,' approved April 26, 1898, it is provided 'That in time of war every officer serving with troops operating against an enemy who shall exercise, under assignment in orders issued by competent authority, a command above that pertaining to his grade, shall be entitled to receive the pay and allowances of the grade appropriate to the command so exercised.'

"The Attorney-General has held that this clause 'was intended to apply to all instances where the troops of the United States are assembled in separate bodies, such as regiments, brigades, divisions, or corps,

for the purpose of carrying on and bringing to a conclusion the war with Spain;' but that 'all service in the Army at the present time is not to be considered as operating against an enemy. Troops and their officers on the western frontiers, performing the same service as garrisons which is requisite in time of peace, and in no wise considered a part of the Army assembled to carry on the war with Spain, would not be within the meaning of the act.

7 "To entitle an officer to the pay of a grade above that actually held by him the assignment in orders under the clause cited must be by the written order of the commanding general in the field or the Secretary of War, and no pay or allowances of a higher grade than that actually held by an officer will be paid under this provision except when a certified copy, in duplicate, of such order, with statement of service, is filed with the paymaster. * * *"

General Orders, No. 86, was amended by General Orders, No. 155, dated September 27, 1898, by striking out the above portion of the order, and on the same date Circular No. 18, promulgating this order, was amended by striking out the portion above quoted and inserting in lieu thereof the following language, to wit:

"To entitle an officer to the pay of a grade above that actually held by him under section 7 of the act of Congress approved April 26, 1898, he must be assigned in orders issued by competent authority to a command appropriate to such higher grade of troops operating against the enemy." (Circ. No. 39, A. G. O., Sept. 27, 1898.)

At the time that he assumed and during the time that he exercised command of Troop E he was the senior officer present with the troop.

The Treasury Department, from the decision of the Comptroller of March 31, 1899 (5 Comp. Dec., 641), to the decision of the court in the Humphreys case (38 C. Cls. R., 689), on May 25, 1903 (pp. 15–16), recognized this sort of orders, so subsequently confirmed, as sufficient authority for the higher pay. Under similar orders, subsequently affirmed, all officers were paid either by the Pay Department or by the Treasury Department in claims presented after the war.

III.

From August 26, 1898, to October 19, 1898, claimant was originally paid the rate due a second lieutenant of cavalry, and from October 20 to October 23, 1898, he originally received the pay of a first lieutenant of cavalry. He subsequently filed a claim for additional pay for command of the troop and was paid by the Auditor for the War Department, October 30, 1899, the pay of a captain for the entire period from August 26, 1898, to October 23, 1898.

IV.

On the 14th day of September, 1898, a furlough of thirty days for said regiment was authorized under General Orders, No. 130, A. G. O., 1898, and amendatory circulars. The above-named claimant did not receive such furlough. From the beginning of the furlough to September 26, 1898, the said claimant was sick in Mount Carmel Hospital, Columbus, Ohio. From September 26, 1898, to the end of the furlough

period he was detained for duty and actually performed duty. During the whole furlough period he was at all times subject to the orders of his superior officers until final muster out. Claimant was first taken sick at Huntsville, Ala., before the furlough, but accompanied his regiment to the home station at Columbus, Ohio, where he was placed in the hospital by officers of said regiment, the surgeon being absent. While at the hospital claimant performed some military service by directing a clerk employed by him for that purpose.

8 V.

If claimant is entitled to retain the pay already received by him, the amount due him as extra pay at the rate due a captain, mounted, is $166.66.

If entitled to extra pay at the rate due a second lieutenant, mounted, the amount due is $125.

If entitled to extra pay and not entitled to retain the pay of a captain as stated in finding 3, there should be deducted from the extra pay allowed the sum of $79.44.

Howry, J., delivered the opinion of the court:

This is one of a class of cases awaiting the decision of the court in the Treasury Department. The questions presented affect many Army and Navy officers in the service during the late war with Spain, and will continue to affect all officers in the military and naval service in time of war where the officer serving with troops operating against an enemy shall exercise, under assignment in orders issued by competent authority, a command above that pertaining to the grade of such officer, unless the statute which is claimed to confer rights now claimed be in the meantime repealed.

There are three questions to be considered: (1) Whether the claimant shall receive a full month's extra pay; (2) if so, whether as captain of cavalry, in accordance with his title to the same, as stated by the auditor for the court, or as second lieutenant, and (3) whether the claimant shall be charged with what the Auditor for the War Department now considers an overpayment of the difference between the pay of a second lieutenant and the pay of a captain while in active service. The findings disclose the facts about which there has been no essential dispute.

The right to some extra pay has been settled by this court. (Charles B. Hunt *v.* United States, 38 C. Cls. R., 704; Francis Magurn *v.* Same, 39 C. Cls. R., 416; Edward D. Legg, 40 C. Cls. R., 115.)

But whether the extra pay shall be that of a second lieutenant or a captain, and whether the captain's pay already received by the officer is a proper set-off, are questions yet involved, determinable by the claimant's status as an officer at and before the furlough period. That is, whether the claimant is entitled to captain's pay under the act of April 26, 1898 (30 Stat. L., 364), which reads as follows:

"SEC. 7. That in time of war every officer serving with troops operating against an enemy who shall exercise, under assignment in orders issued by competent authority, a command above that pertaining to his grade, shall be entitled to receive the pay and allowances of the grade appropriate to the command so exercised."

It is contended that the claimant was not assigned to the command of troops in orders issued by competent authority, within the meaning of the statute, because the order was not of a kind contemplated by the act and because the order was a nullity, inasmuch as the command would have been exercised without it. It is also contended that the service was not rendered with troops operating against an enemy, and finally, that the command of the troop was not above the command pertaining to the officer's grade.

9 Treating these propositions in their inverse order, the proposition referring to the command above that pertaining to claimant's grade comes first. The officer was commissioned second lieutenant, which had no grade by the Army Regulations, but he commanded a company by the order which was the appropriate command for a captain, under the order or without it. This command of the company continued during the illness of the officer. On his return to duty he resumed the functions of company commander. Thus, there was no distinction between claimant's services before and after the furlough period and during that period when he was ill. In that the claimant exercised a command beyond his grade of lieutenant, the case is not like that of Truitt (38 C. Cls. R., 398), where it was held that an officer engaged in the performance of staff duty was not exercising a higher command within the meaning of the act, though his duties were different. The distinction between the two cases and the turning point of this branch of the case now before us is that Congress intended to provide the compensation of the higher grade to an officer performing higher duties, if properly assigned to perform such higher duties. But with an order or without its compensation was limited to higher duties.

Was this officer serving with troops operating against an enemy? He was one of the volunteers enlisted for service in the war with Spain. He was in the field for the porposes of the war. He was not marching and countermarching in the actual presence of the enemy. In a sense he was not engaged in a campaign and in a sense he was. The movements of the command to which he belonged were a part of the scheme to subdue an enemy also in the field. That enemy was certainly on the water at that time in force and presumably ready to effect a landing somewhere or to do some damage along the coast in or near some harbor. The command to which the officer belonged was engaged in operations that must be estimated as a general part of the objects of the war. Any rule that would restrict the operations of troops against an enemy to distinctly offensive operations, as contradistinguished from defensive operations, would be somewhat difficult of application and certainly productive of results probably never intended by Congress in the passage of this act. Such a rule would exclude those troops in the field on the defensive or engaged in defensive tactics. The broad and, as we think, the proper rule would include every command ready to take the initiative or in position to fight in defense, within the country or out of it, and along the coast or in the interior, if the movements of an enemy should render probable actual combat. These views underlie the decision of this court in Glenn *v.* United States (37 C. Cls. R., 254), as well as the view of the Attorney-General of the United States (22 Opin., 95) in considering this phase of the matter.

The serious question in the case arises on the contention that this officer was not assigned to the command of troops in orders issued by competent authority within the meaning of the act of 1898.

Army Regulations require all persons in the military service to obey strictly and to execute promptly the lawful orders of their superiors (Art. 1). But when Major Humphreys claimed the pay of a lieutenant-colonel this court decided (the Chief Justice delivering the opinion) that Humphreys did not exercise a command above that pertaining to his grade of major, which was primarily the command of a battalion. The court said that "these additional duties are neither honors nor burdens placed upon the officer by competent authority; they are the ordinary incidental duties of military official life which go with each officer's commission. It seems to the court incontrovertible that the words 'under assignment in orders issued by competent authority' constitute the controlling limitation of the statute, and the limitation implies that the benefits of the statute extend only to cases where such an order is necessary to impose the burden of the higher command upon an officer." (38 C. Cls. R., 689.)

There is great force in the reasoning of the court as to an assignment to a higher command being necessary before the officer so assigned can be entitled to claim the pay of the higher rank. In the first place, an order is generally quite unnecessary (though under exceptional circumstances, growing out of prolonged absence, it might be advantageous), and it would seem that Congress did not intend by this act to thus indirectly legislate an increase of compensation except where competent authority should exceptionaliy provide for it, because of some special reason for the assignment under orders. In the second place, if an order should be withheld in the case of an officer exercising a higher command merely by virtue of seniority, such officer would have imposed upon him the duties and responsibilities of the higher command without the corresponding pay of the higher rank, while the officer who happened to be assigned under orders would have higher pay with no more reason. Discriminations of this kind might, and probably would, be of frequent occurrence and unfair to those not specially favored. The order in any case is superfluous except to obtain greater pay.

The writer was not present when the Humphreys case was considered, but now voicing the views of the entire court it appears to us that the decision in that case is reasonable for the particular circumstances which there appear. Major Humphreys claimed the pay of a lieutenant-colonel, when in fact there was no difference between the command of a major and the command of a lieutenant-colonel. Both of these officers had charge of battalions. There the lieutenant-colonel took command of the regiment and Major Humphreys, who was already in command of a battalion, took charge of another battalion which had been commanded by the lieutenant-colonel. The court decided that the major did not in fact exercise a command above that pertaining to his grade of major, which was primarily the command of a battalion.

General Orders, No. 86, July 2, 1898, A. G. O., embodying an opinion by the Attorney-General, declared that to entitle an officer to the pay of a grade above that actually held by him the assignment in orders, under the clause cited, must be by the written order of the commanding general

in the field or the Secretary of War, and that no pay or allowances of a higher grade than that actually held by an officer would be paid under this provision, except when a certified copy, in duplicate, of such order, with statement of service, should be filed with the paymaster.

This order from the headquarters of the Army seems to have been modified in a short time (September 27, 1898, 5 Comp. Dec., 360) by a circular in the nature of an amendment which declared that "to entitle an officer to the pay of a grade above that actually held by him
11 under section 7 of the act of Congress approved April 26, 1898, he must be assigned in orders issued by competent authority to a command appropriate to such higher grade of troops operating against the enemy (Circ. 39, A. G. O., 1898). Thus, the first general order was discredited at headquarters by putting the matter in such shape that it was not necessary for the commanding general or the Secretary of War to approve the assignment in orders. The first order would indicate that some necessity must exist for the assignment, to be determined by the commanding general or the Secretary of War, and is substantially in line with the decision of this court in the Humphreys case (38 C. Cls. R., 689). The last order would indicate that the necessity for an order should not appear, but should be determined at the discretion of any superior officer in the field making the assignment—an entirely different version of the meaning of "competent authority."

The Comptroller seems to have thought payments warranted in a large number of cases where the claims were made for higher pay by those who were assigned to perform higher duties by virtue of orders not emanating from headquarters, and there is much force in the ruling of that officer that Congress intended to attach a substantial meaning to the act by permitting any officer in the field in command to designate another officer to temporarily fill the position of an absent officer which thereby determines by orders that the absence is of such a character as to justify the assignment with the consequent increase of pay (5 Comp. Dec., 639; 6 ibid., 187; 8 ibid., 470; 8 ibid., 753, 837; 9 ibid., 527; MSS. Dec., 139; Dig. Comp. Dec., ——). Thus, we have a responsible law and accounting officer of the Treasury sanctioning the final views emanating from the Headquarters of the Army, in conflict with the first view of the War Officer, and contrary to the view of this court.

While the construction given to a statute by those charged with its execution is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons (United States v. Moore, 95 U. S. R., 763), the double departmental construction given by the War Department greatly diminishes the force of either. Especially in the matter at bar does the last construction given in the War Office not appeal to us, because the first construction given from the Headquarters of the Army as to what constituted competent authority was founded upon the opinion of the Attorney-General.

The effect of the statement of the court respecting the limitation of the statute has been to suspend all payments by the Treasury to both army and navy officers in any grade who exercised command appropriate to a higher grade under assignment in orders by competent authority (as construed by the last order from army headquarters) if they might have exercised the same command by virtue of seniority without orders.

Accordingly, contemporary construction has been reversed, and confusion has been the result.

The court is of opinion that any construction which permits the pay of two or three generals or a dozen colonels or a hundred captains, as the case may be, to be duplicated as temporary absences occur without some necessity for orders in assignment, is liable to produce abuses never contemplated by the lawmakers. Gratuitous assignments could never serve any purpose except to increase the pay.

But speculations upon consequences no less than the primary view taken at army headquarters and the subsequent change of front
12 there settle nothing. Some scope should undoubtedly be given for the operation of the act different from the practice, which before the enactment devolved higher command by virtue of seniority. The ambiguity in the language leaves room for construction as to when and by whom orders shall be given carrying the increase of pay. Some authority, competent it must be, by the law was authorized to make a valid order carrying the increase. Can the court, any more than the accounting officers, as set forth in Glenn's case, supra, go behind any order of assignment to higher command and question the wisdom, expediency, or necessity of assigning an officer to the charge of something above that pertaining to his grade, except to inquire whether the order of assignment has been carried into effect according to law, and to ascertain the extent of an officer's service? Can the court pass upon the competency of the authority issuing the orders, as between the commanding general, subject to the approval of the Secretary of War, and any other officer directing the movement of troops and making the order? These are questions open to grave doubt. It is, as said by Weldon, J., in Glenn's case (in passing upon the power of the accounting officers), a most difficult question of administrative law.

As the language of the act is uncertain as to who may make an order and when it may be made, but clear enough that some competent authority may do so without in terms defining the time, and as the claimant (with others of his class) is now denied pay, without the right of appeal because of the limited amount involved; and as the defendants may exercise the right of appeal irrespective of the amount, we have decided to resolve the doubt in favor of the claim, with the expectation that whatever question there be in the case will find final construction on an appeal to the Supreme Court. It is of vital importance that the administrative branch of the Government have a decisive judicial construction in settlement of a much-vexed question.

Judgment will therefore be rendered for the claimant in the sum of $166.66.

BY THE COURT.

Filed December 18, 1905.

13 V.—Judgment of the Court.

At a Court of Claims held in the city of Washington on the 18th day of December, A. D. 1905, judgment was entered as follows:

The court on due consideration of the premises find for the claimant and do order, adjudge, and decree that the claimant, Donn C. Mitchell,

do have and recover of and from the United States the sum of one hundred and sixty-six dollars and sixty-six cents ($166.66).

BY THE COURT.

14 VI.—Application for and Allowance of Appeal.

Term 1905–1906.

DONN C. MITCHELL *vs.* THE UNITED STATES. } No. 24371.

From the judgment rendered in the above-entitled cause on the 18th day of December, 1905, in favor of claimant, the defendants, by their Attorney-General, on the 27th day of December, 1905, make application for and give notice of an appeal to the Supreme Court of the United States.

LOUIS A. PRADT,
Assistant Attorney-General.

Filed January 2, 1906.

January 2, 1906, the foregoing appeal allowed as prayed for.

BY THE COURT.

15 In the Court of Claims.

DONN C. MITCHELL *vs.* THE UNITED STATES. } No. 24371.

I, John Randolph, assistant clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and opinion filed by the court; of the judgment of the court; of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 9th day of January, A. D. 1906.

[SEAL COURT OF CLAIMS.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) File No. 20043. Court of Claims. Term No. 541. The United States, appellant, vs. Donn C. Mitchell. Filed January 11th, 1906. File No. 20043.

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JAMES H. McKENNEY,
CLERK

No. 180.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES, APPELLANT,

v.

DONN C. MITCHELL.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

JOSIAH A. VAN ORSDEL,
Assistant Attorney-General.

GEO. M. ANDERSON,
Special Attorney.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE UNITED STATES
v.
DONN C. MITCHELL. } No. 180.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE DEFENDANTS.

STATEMENT OF THE CASE.

This is the claim of a second lieutenant who served in the United States Volunteer Cavalry during the war with Spain, for extra pay under the act of January 12, 1899 (30 Stat. L., 784), as amended by the act of May 26, 1900 (31 Stat. L., 217), and pay for the exercise of higher command under section 7 of the act of April 26, 1898 (30 Stat. L., 364).

The claimant was enrolled on May 3, 1898, as second lieutenant of Troop E of the First Ohio Volunteer Cavalry, for service during the war with Spain, and served in that grade until October 20,

1898, when he was promoted to the grade of first lieutenant, and was mustered out of the United States service in the latter grade on October 23, 1898. His entire service was within the limits of the United States.

By regimental Special Orders, No. 44, dated August 24, 1898, First Lieut. William D. Forsyth, who was in command at that time of Troop E, First Ohio Volunteer Cavalry, was relieved from command in order to take an examination for appointment as second lieutenant in the Regular Army, and was ordered to turn the Government property, funds, and records of the troop over to his successor. In the same order the claimant was *appointed* to the command of Troop E, and ordered to receipt to Lieutenant Forsyth for Government property and funds belonging to the troop.

In pursuance of this order the claimant assumed command of the troop on August 26, 1898, and exercised command until the First Ohio Volunteer Cavalry was mustered out of the United States service on October 23, 1898, and during that period he received the pay of a second lieutenant of cavalry. Subsequently he filed a claim for additional pay for command of the troop, which was allowed by the Auditor for the War Department October 30, 1899, and he received the difference between the pay of a second lieutenant of cavalry and captain of cavalry for the entire period from August 26, 1898, to October 23, 1898.

On September 2, 1898, Special Orders, No. 97, were issued by command of Major-General Coppinger, in which certain assignments contemplated by General Orders, No. 86, current series A. G. O., were confirmed, and among them that of "Second Lieutenant Donn C. Mitchell as captain from August 24, 1898."

On September 14, 1898, a furlough of thirty days for the regiment to which the claimant belonged was authorized by General Orders, No. 130, A. G. O., 1898, and amendatory circulars. The claimant did not receive the benefit of a furlough. He was taken sick at Huntsville, Ala., before the furlough, but he accompanied his regiment to Columbus, Ohio, where he was placed in the hospital by officers of his regiment, the regimental surgeon being absent. While at the hospital he performed some military service by directing a clerk employed by him for that purpose. He remained sick in the hospital from the beginning of the furlough period until September 26, 1898, and from that time until the end of the furlough period, October 13, 1898, he was detailed for duty and actually performed military duty. During the whole furlough period he was at all times subject to the orders of the superior officers until final muster out.

The Auditor for the War Department recommended that in view of the decision in the case of *Humphreys* v. *The United States* (38 C. Cls. R., 689) the difference in pay between the grades of second lieutenant mounted and captain mounted

received by claimant from August 26, 1898, to October 23, 1898 ($79.44), was a proper stoppage against his one month's extra pay as of the grade of second lieutenant, so that if entitled to extra pay under the act of January 12, 1899, as amended by the act of May 26, 1900, he should receive the sum of $45.56.

The Court of Claims rendered judgment in favor of the claimant for the sum of $166.66.

ASSIGNMENT OF ERRORS.

The Court of Claims erred:

First. In holding that the claimant exercised a command above that pertaining to his grade.

Second. In holding that the claimant was serving with troops operating against an enemy.

Third. In holding that the claimant was properly assigned to the command of his company.

Fourth. In not dismissing the claimant's petition.

ARGUMENT.

I.

Extra Pay.

As the Court of Claims has made a finding of fact (finding No. 4) that the claimant was taken sick before the beginning of the furlough period, and after his recovery was detained by proper authority for the performance of military duties until the end of the furlough period, it would appear that under the rule laid down by the Court of Claims in the cases of *Charles B. Hunt* v. *The*

United States (38 C. Cls. R., 704), *Francis Magurn* v. *The United States* (39 C. Cls. R., 416), and *Edward D. Legg* v. *The United States* (40 C. Cls. R., 115), and uniformly followed by the accounting officers since the decision of those cases, he is entitled to extra pay, and the only question for this court to consider is the amount to which he is entitled.

II.

Questions Raised on Appeal.

The rank that the claimant held during the furlough period of his regiment was that of a second lieutenant of cavalry, the compensation of which is at the rate of $125 per month. Under the rule laid down by the Court of Claims in the case of *Terreil* v. *The United States* (40 C. Cls. R., 78), which has been uniformly followed by the accounting officers of the Treasury since the decision of that case, an officer held for military duty during the furlough period of his regiment is entitled to extra pay under the act of January 12, 1899, as amended by the act of May 26, 1900, at the same rate as the pay proper of the rank held by him during the furlough period.

The questions presented to the court for consideration are:

First. Whether the claimant is entitled to receive one month's extra pay of a captain of cavalry ($166.66) or one month's extra pay of a second lieutenant of cavalry ($125).

Second. If entitled to the extra pay of a second lieutenant of cavalry during the furlough period, whether the difference between the pay of a captain of cavalry and a second lieutenant of cavalry received by him ($79.44) from August 26, 1898, to October 23, 1898, or whether the difference between the pay of a captain of cavalry and a second lieutenant of cavalry received by him during the furlough period, September 14 to October 13, 1898 ($41.66), should be deducted from said extra pay.

III.

Higher Command Pay.

The act under which the claim is made for exercising a command higher than that pertaining to his grade, is that of April 26, 1898 (30 Stat., 364), which reads as follows:

> SEC. 7. That in time of war every officer serving with troops operating against an enemy who shall exercise, under assignment in orders issued by competent authority, a command above that pertaining to his grade shall be entitled to receive the pay and allowances of the grade appropriate to the command so exercised.

The above section embodies four conditions which must have concurred in the service of a volunteer officer, during the war with Spain, to entitle him to receive the pay and allowances provided for by the act.

1. The service must have been rendered in time of war.

This condition has unquestionably been fulfilled by the service of the claimant, as the United States at the time his services were rendered was engaged in a war with Spain.

2. The service must have been rendered with troops operating against an enemy.

3. The assignment must have been made in orders issued by competent authority.

4. The command exercised must have been above the command pertaining to the grade of the officer exercising it.

The Court of Claims in its application of the conditions imposed by the statute to the case of the claimant has seen fit to change their order, and in discussing these conditions under separate headings in this brief, the defendants have considered it wise to follow the order laid down by the Court of Claims in its opinion.

IV.

Was the Command Exercised Above that Pertaining to his Grade?

The Court of Claims in considering this branch of the case decided against the contention of the defendants upon the ground that "Congress intended to provide the compensation of the higher grade to an officer performing higher duties, if properly assigned to perform such higher duties. But with an order or without, its compensation was limited to higher duties." The Court of Claims also undertook to differentiate the case of *Truitt* (38 C. Cls. R., 398) from the case at bar. We

will endeavor to convince the court that this position of the Court of Claims is inconsistent with both the language and spirit of the statute and with its previous construction by the Court of Claims.

The Army Regulations of 1895 (in force at the time the act was past and the services rendered) provide:

> SEC. 14. The following are the commands appropriate to each grade:
>
> 1. For a captain, a company.
> 2. For a major or lieutenant-colonel, a battalion or squadron.
> 3. For a colonel, a regiment.
> 4. For a brigadier-general, two regiments.
> 5. For a major-general, four regiments.

In the case of *Humphreys* v. *The United States* (38 C. Cls. R., 689) Chief Justice Nott, who delivered the opinion of the court, said:

> It is also to be said that the term "command" in the statute refers not to the commander but to the commanded—not to rank or grade or the giving of orders, but to organized bodies of troops whose commanding officers have a certain rate of pay regulated by law. The command of a brigadier is his brigade. The command of a colonel is his regiment; the command of a captain is his company. A lieutenant-colonel has no command—that is to say, he commands no integral part of a regiment (692 and 693).

In the case of *Truitt* v. *The United States* (38 C. Cls. R., 398) the court held that an officer who is

engaged in the performance of staff duties was not exercising a higher command within the intent of section 7 of the act of April 26, 1898, altho the grade filled by him at the time was higher than his appropriate grade, and the duties performed were more onerous and difficult than the duties of his appropriate grade. The court said:

> The claimant was not "serving with troops operating against an enemy" in the sense of exercising a command over such troops, and therefore he is not entitled to recover (407).

It is very difficult to perceive from the reasoning of the Court of Claims in the case at bar, why the Truitt case is inapplicable. In this case that court held that the claimant is entitled to recover, not because he exercised a command higher than that pertaining to his grade, but because he performed higher duties. In the Truitt case the same court held that altho the claimant performed higher duties he did not exercise a higher command, and was not therefore entitled to recover.

The Army Regulations provide no command for a subaltern; the lowest officer in rank provided for in that respect is a captain. The claimant, therefore, whose grade was that of a second lieutenant of cavalry, had no command pertaining to his grade, and his case does not come within the purview of the act. He was merely a supernumerary in the company, whose authority under the regulations to exercise any command at all was contingent upon the absence of his two superior officers,

the first lieutenant and captain. It can not be said that the claimant exercised a *higher command* when in command of the troop, because in his appropriate grade he exercised *no command at all*, for if the regulations gave him any command whatever it was the contingent command of the company to which he belonged. The statute does not say that increased compensation shall be received for exercising higher duties or exercising *a command*, but for exercising *a higher command*. As the Court of Claims said in the Humphreys case, the statute does not refer to the commander, but to the troops which he commands.

V.

Was the Claimant Serving with Troops Operating Against an Enemy?

During the war with Spain there were established in the United States a number of camps for the instruction of volunteers in the performance of military duties and the arts of war. Some of the regiments, after having undergone a course of military instruction at these camps, were transferred to the seat of war, some to coast defenses, and some were sent home to be mustered out of the United States service. The words employed in the act, "operating against an enemy," clearly indicate operations defensive in their character, and are inapplicable to the course of training received by volunteer troops at camps of instruction, where

they were being prepared for operations against the enemy.

The troops assembled at camps of instruction were not there "for the purpose of carrying on and bringing to a conclusion the war with Spain," but were simply there for the purpose of receiving military instruction. Some of them were to be selected for their efficiency and sent to the front, while some of them, for whom there was no particular use at the time, were sent home for muster out of the United States service. Troops stationed in the defenses along the Atlantic coast might very properly have been considered as constructively "operating against an enemy," especially in view of the fact that the Spanish fleet was for a time at large upon the seas and its location unknown to the United States authorities.

Camp Wheeler, Huntsville, Ala., where the claimant's services were performed, was situated in the interior of the country, far from any prospective operations against the enemy; and aside from the fact that the troops had volunteered for the Spanish war, they were no more "operating against an enemy" than were the troops stationed at Fort Leavenworth, Kans., or the cadets undergoing instructions at West Point or Annapolis. The officers stationed at Huntsville experienced none of the dangers or hardships incident to a period of actual hostilities, and the responsibilities of higher command were no greater than in ordinary times of peace.

In the *Truitt case* (*supra*), the court, in construing this act, speaking of the services of a staff officer, said:

> The evident purpose of the act was to compensate officers "serving with troops operating against an enemy" for the greater risk and responsibility attending the command which they may have exercised above that pertaining to their grade (407).

In regard to the claimant's right to pay for the exercise of a higher command, a distinction should be drawn between the time he was serving in the camp of instruction at Huntsville, Ala., and the furlough period of his regiment, which began September 14, 1898, and terminated October 13, 1898. From the beginning of this period until September 26, 1898, the claimant was sick in the hospital, and afterwards, until the end of the furlough period, the enlisted men of the company being at home upon furlough, he was engaged in the performance of clerical duties, which, as was said in the *Truitt case* (*supra*), did not entitle him to higher pay, and in addition to which, instead of serving with troops operating against an enemy and encountering the increased risk and responsibility, he was simply engaged in settling up the accounts of the company, preparatory to his discharge from the United States service.

From the beginning of the furlough period until the final muster out of the regiment, the troops were not *operating against an enemy*, nor was the

claimant in command of his troop within the intent of section 7 of the act of April 26, 1898.

In the case of *William R. Collins* v. *The United States*, No. 22571, decided by the Court of Claims May 25, 1903 (not reported), claim was made by a first lieutenant of Company M, First Ohio Volunteer Infantry, for the exercise of higher command while in command of his company from the beginning of the furlough period to muster out. That was a much stronger case than the case at bar, inasmuch as the troops were kept at their armory in Cincinnati and their organization preserved. Nevertheless, the Court of Claims in that case refused to grant the higher pay claimed.

VI.

Was the Assignment in Orders Issued by Competent Authority?

The claimant, at the time he assumed command of his company, August 26, 1898, was the senior officer present, and as such, in the absence of his captain and first lieutenant, succeeded to the command by virtue of the Regulations.

Section 253 of the Army Regulations of 1895 (in force when the act was past and the services rendered) provides that:

> In the absence of its captain, the command of the company devolves upon the subaltern next in rank who is serving with it, *unless otherwise specially directed.*

Special Orders, No. 44, dated August 24, 1898 (Rec., pp. 2 and 3), were issued by order of

Lieutenant-Colonel Day of the First Ohio Volunteer Cavalry for the purpose of relieving First Lieut. William D. Forsyth (who was then commanding Troop E) from his command, and directed him to turn over the property, funds, and records of the troop to his successor. The *appointment* of Second-Lieutenant Mitchell (the claimant) to the command of the troop appears to have been only made as an incident to the order relieving Lieutenant Forsyth of the command, and having been entirely unnecessary, could in no sense be considered as an assignment in orders issued by competent authority within the meaning of section 7 of the act of April 26, 1898. The word *appointment* instead of *assignment* appears to have been used with the evident purpose of preventing a mistake as to the meaning and intent of the order.

There was an attempted confirmation of the *appointment* of the claimant to the command of his company by Special Orders, No. 97, dated September 2, 1898, issued by command of Major-General Coppinger, confirming "the assignment thereto contemplated by General Orders, No. 86, current series, Adjutant-General's Office." (Rec., p. 3.) General Orders, No. 86, July 2, 1898, Adjutant General's Office (in force at the time of the issuance of Special Orders, Nos. 44 and 97), embodying an opinion by the Attorney-General, uses this language:

> To entitle an officer to the pay of a grade above that actually held by him, the assign-

> ment in orders, under the clause cited, must be by the written order of the commanding general in the field or the Secretary of War, and no pay or allowances of a higher grade than that actually held by an officer will be paid under this provision, except when a certified copy, in duplicate, of such order, with statement of service, is filed with the paymaster. (Rec., pp. 3–4.)

Under General Orders, No. 86, the assignment of the claimant to the command of his company could have been legally ordered only by the commanding general in the field or the Secretary of War, and a certified copy in duplicate should have been filed with the paymaster in order to entitle him to the higher pay. The general order also, from language used, evidently contemplated the issuance of the order of assignment prior to the assumption of the higher command. Therefore, the claimant never having been properly assigned within the meaning of the act of April 26, 1898, or of General Orders, No. 86, there could have been no valid confirmation. Nor were certified copies, in duplicate, of Special Orders, Nos. 44 and 97, filed with the paymaster, as required.

The commanding general in the field had no power to delegate his authority to assign an officer to a higher command, nor had he the power to subsequently confirm and ratify such unauthorized action by any officer under his command.

Admitting, however, for the sake of argument, that regimental Special Orders, No. 44, were cor-

rect in form and issued by competent authority, as contemplated by section 7 of the act of April 26, 1898, still, having been entirely unnecessary and superfluous, they could have been issued for but one purpose alone—that of giving the increased pay provided by the act. It was against just such expedients as this that the opinion of the Court of Claims, delivered by the chief justice, was principally directed in the case of *Humphreys* v. *The United States* (*supra*), where the court, after discussing the rule of succession by seniority, goes on to say:

> But in none of these cases is an "assignment in orders issued by competent authority" necessary. These additional duties are neither honors nor burdens placed upon the officer by competent authority; they are the ordinary incidental duties of military official life which go with each officer's commission.
>
> It seems to the court incontrovertible that the words "under assignment in orders issued by competent authority" constitute the controlling limitation of the statute; and the limitation implies that the benefits of the statute extend only to cases where such an order is necessary to impose the burden of a higher command upon an officer. Where a colonel is assigned to the command of a brigade, or where a lieutenant-colonel is assigned to the command of another regiment than his own, there will be a case coming within the intent of the statute (p. 692).

In the ordinary course of military affairs it is unquestionably true that the rule of succession by seniority prevails. The regulations provide that such shall be the case, and the practise adopted in carrying the regulations into effect has been uniform. Therefore, if as the attorneys for the claimant contended when the case was argued in the court below, no case can arise where an assignment under orders, issued by competent authority, contrary to the rule of seniority can be otherwise than made in violation of the regulations, it would seem to follow that the words "under assignment in orders issued by competent authority," which have been said by the Court of Claims in the Humphreys case to "constitute the controlling limitation of the statute," were entirely unnecessary and superfluous, and are without meaning or legal effect. The contention of the claimant's attorneys that unless the assignments are made in accordance with the seniority rule they are made in violation of the regulations is denied, especially in this case, as section 253 (*supra*) of the regulations provides that the seniority rule shall prevail "*unless otherwise specially directed.*"

Had the captain of the company been absent, and both the first and second lieutenants been present, and had the second lieutenant been assigned to the command of the company over the head of the first lieutenant, then the seniority rule would have been violated, altho such action would have been in strict conformity to both section 7 of

the act of April 26, 1898, and the Army Regulations. Section 253 of the regulations provides for exceptions to the seniority rule in special cases, and it was toward just such cases that section 7 of the act of April 26, 1898, was directed, by providing the manner in which the exceptions shall be carried into effect.

It may be said that any provision of a statute intended to vary the usual and ordinary rule of seniority prescribed by the regulations is of an extraordinary character, and this is undoubtedly true, as such acts are evidently intended to provide only for extraordinary occasions and are not enacted for the purpose of unnecessarily increasing the cost of the war establishment of the Government.

The seniority rule, having grown up by custom in the Army, was afterwards embodied in the regulations, and was considered too sacred many years ago to be varied, except on occasions of the greatest military necessity.

During the civil war (April 4, 1862) a resolution was enacted "to authorize the President to assign the command of troops in the same field or department to officers of the same grade, without regard to seniority." This resolution was repealed by the act of July 17, 1866, ch. 176, sec. 5 (14 Stat., 92).

Assignments which Congress has so jealously guarded as to permit only the President himself in time of war to make, would hardly, many years afterwards, be delegated by that body to a colonel

of volunteers; still less would it permit an officer of that rank to supersede at will the seniority rule.

The Court of Claims in deciding this case said:

> The court is of opinion that any construction which permits the pay of two or three generals or a dozen colonels or a hundred captains, as the case may be, to be duplicated, as temporary absences occur, without some necessity for orders in assignment, is liable to produce abuses never contemplated by the lawmakers. Gratuitous assignments could never serve any purpose except to increase the pay.

And as was said by Judge Nott, in deciding the Humphrey case, "what the law contemplated his doing was to make necessary and not gratuitous assignments."

CONCLUSION.

This being a comparatively recent act, there can, of course, have been no long-continued construction by the Treasury Department. That the construction has not been uniform is evidenced by the fact that the Department has held both ways; however, since the decision of the Court of Claims in the Humphreys case, May 25, 1903, it has held uniformly and consistently to the rule laid down therein.

Respectfully submitted.

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IN THE

Supreme Court of the United States.

October Term, 1906.

No. 180.

THE UNITED STATES, *Appellant,*

v.

DONN C. MITCHELL.

APPEAL FROM THE COURT OF CLAIMS.

Brief for Appellee.

GEORGE A. KING,
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IN THE

Supreme Court of the United States.

October Term, 1906.

THE UNITED STATES, *Appellant*,
v.
DONN C. MITCHELL. } No. 180.

Appeal from the Court of Claims.

BRIEF FOR APPELLEE.

I. Statement of the Case.

This is a suit by an officer of Troop E, First Regiment Ohio Cavalry Volunteers in the War with Spain, for one month's extra pay on honorable discharge and muster out from the service. (Petition, Record p. 1.)

Statutes Providing Extra Pay.

The claim arises under the following provisions:

Act of January 12, 1899 (30 Stat. L. 784)—

An Act Granting extra pay to officers and enlisted men of United States Volunteers.

Be it enacted, etc., That in lieu of granting leaves of absence and furloughs to officers and enlisted men belonging to companies and regiments of United States Volunteers prior to muster out of the service, all officers and enlisted men belonging to volunteer organizations hereafter mustered out of the service who have served honestly and faithfully beyond the limits of the United States shall

be paid two months' extra pay on muster out and discharge from service, and all officers and enlisted men belonging to organizations hereafter mustered out of the service who have served honestly and faithfully within the limits of the United States shall be paid one month's extra pay on muster out and discharge from the service, from any money in the Treasury not otherwise appropriated:

Provided, That the discharge of all officers and enlisted men from the volunteer service of the United States shall, as far as practicable, take effect on the date of the muster out of the organization to which they belong, and that regiments and other independent organizations shall be mustered out at camps within the limits of the United States or at the rendezvous of the State, regiment or independent organization.

Act of May 26, 1900 (31 Stat. L. 217)—

That the Act approved January 12th, 1899, granting "extra pay to officers and enlisted men of the United States Volunteers," shall extend to all volunteer officers of the general staff who have not received waiting orders pay prior to discharge, at the rate of one month to those who did not serve beyond the limits of the United States and two months to those who served beyond the limits of the United States;

and officers and enlisted men of volunteer organizations, who have served honestly and faithfully in the Volunteer Army of the United States during the War with Spain and have been honorably discharged without furlough, or by reason of their services being no longer required, or at any time by reason of wounds received, or disability contracted in the service and in the line of duty, and who have not received the extra pay granted in said Act or in subsequent Acts of Congress supplemental thereto:

And this Act shall be deemed to apply to officers of volunteers who resigned and enlisted men of volunteers who were discharged upon their own applications subsequent to the issue of orders for the muster out of their organizations and prior to the dates of muster out.

Only Question is as to Amount.

The Court of Claims finds (Finding IV, pp. 4, 5) that the claimant was held for duty during the period of thirty days from September 14, 1898, during which his regiment was nominally on furlough. He was thus "discharged without furlough" and was therefore held entitled to extra pay under the act of 1900.

It is conceded in the brief for the United States (top p. 5) that "he is entitled to extra pay, and the only question for this court to consider is the amount to which he is entitled."

This question depends upon the rank in which the extra pay should be calculated.

Service as Second Lieutenant.

The claimant, Donn C. Mitchell, was enrolled in the Volunteer Army during the Spanish War, as second lieutenant of Troop E, First Ohio Volunteer Cavalry, on the 3d day of May, 1898. (Finding I, Record, p. 2.)

Service as First Lieutenant.

He served in the grade of second lieutenant until promoted to first lieutenant October 20, 1898. He was mustered out as first lieutenant October 23, 1898. His entire service was within the limits of the United States. (Finding I, Record, p. 2.)

Service as Captain.

While on duty as second lieutenant of the First Ohio Volunteer Cavalry at Huntsville, Ala., during the Spanish War, claimant received the following order:

"HEADQUARTERS 1ST OHIO VOLUNTEER CAVALRY,
"CAMP WHEELER, HUNTSVILLE, ALA.,
"Special Orders } "*August 24, 1898.*
"No. 44. }

"I. 1st. Lieut. William D. Forsyth, 1st Ohio Volunteer Cavalry, having been ordered before a board for examination for appointment as second lieutenant in the Regular Army, is hereby relieved of the command of Troop E. He will turn over the property, funds and records of the troop to his successor.

"II. 2nd Lieut. Donn C. Mitchell, 1st Ohio Volunteer Cavalry is hereby appointed to the command of Troop E. He will receipt to Lieut. Forsyth for the property and funds pertaining to the troop.

"By order of Lieut. Col. Day: A. C. RODGERS,
"*Captain and Regtl. Adj. 1st Ohio Vol. Cav.*"

This order was approved by the commanding general in the field in the following orders:

"HEADQUARTERS FOURTH ARMY CORPS,
"CAMP WHEELER, HUNTSVILLE, ALA.,
"Special Orders } "*September 2, 1898.*
No. 97. }

* * * * * * *

"II. It appearing from evidence that the following-named officers of the First Ohio Volunteer Cavalry have exercised the functions of commanders above that pertaining to the grades held by them from and after the dates set opposite their respective names, the assignment thereto contemplated by General Orders, No. 86, current series, Adjutant-General's Office, is confirmed, namely:

* * * * * * *

"2nd Lieut. Donn C. Mitchell, as captain, from August 24th, 1898.

* * * * * * *

"By command of Major-General Coppinger:
"CLARENCE K. EDWARDS,
"*Assistant Adjutant General.*"

Under these orders claimant exercised command of Troop E from August 26, 1898, to October 23, 1898, when he was mustered out with his regiment. (Finding II, Record, pp. 2, 3.)

At the time that he assumed and during the time that he exercised command of Troop E he was the senior officer present with the troop. (Finding II, Record, p. 4.)

Rate of Pay Received for Service.

From August 26, 1898, to October 19, 1898, claimant was originally paid the rate due a second lieutenant of cavalry and from October 20 to October 23, 1898, he originally received the pay of a first lieutenant of cavalry. He subsequently filed a claim for additional pay for command of the troop and was paid by the Auditor for the War Department, October 30, 1899, the pay of a captain for the entire period from August 26, 1898, to October 23, 1898. (Finding III, Record, p. 4.)

This action was based upon the provision of the Act of April 26, 1898, 30 Stat. L. 364, which reads as follows:

"Sec. 7. That in time of war every officer serving with troops operating against an enemy who shall exercise, under assignment in orders issued by competent authority, a command above that pertaining to his grade, shall be entitled to receive the pay and allowances of the grade appropriate to the command so exercised."

The Question Stated.

It will thus be seen that the question is, To which of the three following rates of pay is the claimant entitled?

1. The pay of a second lieutenant, the rank actually held by him under his commission on September 14, 1898, when his regiment received the furlough of thirty days, of which he had no benefit (Finding IV, Record, pp. 4, 5.)

2. That of a first lieutenant, the rank actually held by him under his commission at the date of his discharge and muster out of the service.

3. That of a captain, the duties of which grade he was performing from August 26, 1898, to the time of his discharge and muster out (including the period of the nominal furlough), and the pay of which he has received during the time when he was performing its duties.

Right to Retain Pay for Exercising Higher Command.

While no set-off or counter-claim was filed by the United States, the Court of Claims also considered whether the Auditor of the Treasury for the War Department was justified in allowing to the claimant the pay of a captain during the period for which he exercised the command of a company appropriate to that grade.

The assignment of the claimant to the command of that grade was, as has been seen, by order of the commanding officer of the regiment, confirmed by that of the Major-General commanding the 4th Army Corps. The findings also show some general orders of the War Department. The first of these, dated July 2, 1898, requires that the assignment must be by written order of the commanding general in the field, or the Secretary of War. The second strikes out this requirement, and, following the language of the statute, merely requires that the officer be so "assigned in orders issued by competent authority." (Record, p. 4.)

It is also found that the Treasury Department, from March 31, 1899, to May 25, 1903, recognized orders such as those shown in this case as sufficient authority for granting the higher pay.

All officers were paid either by the Pay Department of the Army or by the Treasury Department on claims pre-

sented after the war under orders similar to those shown in this case. (End of Finding II, Record, p. 4.)

Judgment and Appeal.

The Court of Claims gave judgment in favor of the claimant for one month's extra pay at the rate of a captain mounted, $166.66. This is the rate to which the claimant was entitled, and which he actually received, at the time of his muster out as well as at the time when the furlough of thirty days was granted to his regiment, during which the claimant himself was held to duty. The opinion, Record, pp. 5 to 9, is reported 41 C. Cls. 36. From this judgment, the United States appealed.

II. Brief of Argument.

The Case is Within the Statute.

The right to some extra pay is conceded, and the question is, what is the proper rate? The answer of the Court of Claims is that it shall be the rate to which the claimant was entitled and which he received at the time of his muster out and discharge from the service as well as for about two months previous. This includes the time during which his regiment was nominally on furlough, while the claimant was held for active duty and actually discharged duty as the commanding officer of the company.

This conclusion is in accordance with the law whether the rate properly allowable be that of the pay to which the claimant was entitled at the time of his muster out and discharge from the service, as this court decided in the case of the similar statute passed for the Mexican War, in *United States* v. *North*, 112 U. S. 510, affirming 19 C. Cls. 254, or whether the proper rate of pay be that to which he was entitled during the nominal furlough of his regiment, as decided by the Court of Claims under these statutes in *Terrell* v. *United States*, 40 C. Cls. 78.

The Position of the United States.

It is insisted on behalf of the United States, that the claimant did not, during any portion of the time in question, while "operating against an enemy," "exercise, under assignment in orders issued by competent authority a command above that pertaining to his grade," and that he was therefore not "entitled to receive the pay and allowances of the grade appropriate to the command so exercised," under the act of April 26, 1898, § 7, 30 Stat. L. 364, quoted *ante*, p. 5.

The particular defenses raised by the Government are (1) that the service rendered was not with troops "operating against an enemy," (2) that the officer did not exercise "a command above that pertaining to his grade," and (3) that he had no "assignment in orders issued by competent authority." These views will be taken up severally in detail.

Troops Operating Against an Enemy.

The service was in time of war. The troops with which the claimant was serving were assembled at a camp within the limits of the United States for the purpose of operating against the enemy.

This, according to the opinion of Attorney-General Griggs, contemporaneously rendered to the Secretary of War (June 17, 1898), and ever since consistently acted upon, brought the officer so serving within the condition of the statute. The Attorney-General says (22 Opinions of Attorneys-General, 96, 97):

"It would be unjust to interpret the phrase 'every officer serving with troops operating against an enemy' as applicable only to operations in the immediate presence or even the near neighborhood of an enemy. It would be equally unjust to restrict its meaning to the operations of an actual campaign, even though the movements of

the troops to points of rendezvous before embarkation for hostile territory were counted as properly a part of campaign movements, which unquestionably they are.

"I think the clause in question was intended to apply to all instances where the troops of the United States are assembled into separate bodies, such as regiments, brigades, divisions, or corps, for the purpose of carrying on and bringing to a conclusion the war with Spain. If the operations of the troops are with the direct object of assisting in the military measures of the Government for subduing the forces of Spain, they can, within the reasonable intendment of this act, be considered as operating against an enemy, although such operations may not be direct but are in the nature of necessary component steps, though remote, in one great military objective."

And again, pp. 97, 98:

"If the principles I have above laid down as governing the construction of this law are sound, then it is immaterial whether or not there is within our borders any enemy to operate against. There is an enemy, and whatever military operations are carried on, whether in the United States, or in Cuba, or in the Philippine Islands, or upon the high seas, designed as a part of the war measures against Spain, are operations against the enemy. The Army of the United States is just as truly operating against an enemy when en route to a rendezvous, such as Camp Alger, near Washington, or at Tampa, in Florida, as when embarked on transports for a campaign in Cuba.

It would be very difficult to make up the pay rolls if it were held that one rate of compensation is due to officers when the enemy confronts them in the field, and a less rate from the very moment that a hostile army has disappeared from their front. The rate of pay upon such a construction as that would differ from day to day.

I think, also, that while assembled at camps in the United States such as I have named, any troops of the Army assembled for the present war purposes can properly be considered as operating against an enemy, although their present service is confined to the ordinary routine of camp life, drill, discipline, and other preparation. The as-

sembling of such troops, their drilling, disciplining, and equipment, while assembled into military bodies, are all a part of the same general war purpose."

This construction of this statute by the Attorney-General was followed in the practical administration of the law in payments by officers in the field. It was adopted by the Controller of the Treasury. All officers otherwise within this statute have been paid under this construction. Over eight years have now elapsed since these payments were made and nearly all possible claims arising under the law have been settled.

There has thus been a contemporaneous and continuous construction of the statute. To reverse this construction as the Government now contends at this late day, would be to overturn thousands of settlements already made. This would result most unequally. Officers of the Regular Army or others having pending or future claims against the United States would be charged by the accounting officers of the Treasury with the amounts paid under the former construction and these amounts would be deducted from current or back pay due them. Volunteer officers who have no reason for applying to the Treasury Department for future payment of claims would retain the amounts already received by them. A refund of the sums already paid under the construction of the law made by the Attorney-General, adopted by the Controller, and continuously followed in practice, would of itself be a hardship. It would be a grave injustice in this case, since the rule could not be uniformly followed in regard to all persons affected by it.

This court has repeatedly pronounced upon the force to be given to contemporaneous and continuous construction. In *United States* v. *Moore*, 95 U. S. 763, the court said:

"The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. *Edwards* v. *Darby*, 12 Wheat. 210; *United States* v. *The State Bank of North Carolina*, 6 Pet. 29; *United States* v. *McDaniel*, 7 *Id.* 1. The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret."

In *United States* v. *Alabama Railroad Company*, 142 U. S. 621, the court said:

"We think the contemporaneous construction thus given by the executive department of the Government, and continued for nine years through six different administrations of that department—a construction which, though inconsistent with the literalism of the act, certainly consorts with the equities of the case—should be considered as decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced. It is especially objectionable that a construction of a statute favorable to the individual citizens should be changed in such manner as to become retroactive, and to require from him the repayment of moneys to which he had supposed himself entitled, and upon the expectation of which he had made his contracts with the Government. These principles were announced as early as 1827 in *Edwards' Lessee* v. *Darby*, 12 Wheat. 206, 210, and have been steadily adhered to in subsequent decisions. *United States* v. *State Bank of North Carolina*, 6 Pet. 29, 39; *United States* v. *Macdaniel*, 7 Pet. 1; *Brown* v. *United States*, 113 U. S. 568; *United States* v. *Moore*, 95 U. S. 760, 763."

See also *United States* v. *Finnell*, 185 U. S. 244.

The application to the present case of the doctrine announced in these cases requires adherence to the construction of this law announced by the Attorney-General in 1898.

Command Above His Grade.

The troops being thus "operating against an enemy," "in time of war," the question remains whether the officer who is claimant in this case "exercised under assignment in orders issued by competent authority a command above that pertaining to his grade."

Clearly, the command was "above that pertaining to his grade." He was only a second lieutenant, the lowest grade of commissioned officer, and for a short time before his discharge from the service, a first lieutenant; but he was, at the time of his muster out and for about two months previous, in actual command of his company, a command appropriate to the grade of captain, as shown by Section 14 of the Army Regulations quoted in the brief for the United States, page 8.

Assignment in Orders.

The statute says that the higher command must be "exercised under assignment in orders issued by competent authority." The defendants here raise the principal issue in this case and maintain that although orders were issued by competent authority for his assignment to the higher duty, he is not entitled to the higher pay, because the same command would have been exercised by him without the issuance of these orders.

There can be no question that there was a complete literal compliance with the statute. His assignment to the command of the company was made "in orders" of the most formal and peremptory character first issued by the commanding officer of his regiment and

subsequently confirmed by the major-general commanding the corps. (Record, pp. 2, 3.) He thus comes within every condition of the statute.

The claimant exercised a higher command, and he exercised it under orders issued by competent authority, and this is sufficient. As was said by the Court of Claims in a case arising in the Navy under the same statute:

"The statute was intended to encourage officers to hazard greater responsibility in time of war by promising them the pay and allowances of the grade appropriate to the command they might exercise above that pertaining to their respective grades." *Thomas* v. *United States*, 39 C. Cls. 1, 9.

There is no need here for interpretation or construction of the statute. The language is plain and unambiguous. The questions are whether there was an assignment in orders, and whether these orders were issued by competent authority. The orders are here under unquestionable authority. The will of Congress expressed in the statute is therefore met and the right to higher pay follows.

This court said in *Lake County* v. *Rollins*, 130 U. S. 671:

"Words are the common signs that mankind make use of to declare their intention to one another; and when the words of a man express his meaning plainly, distinctly and perfectly, we have no occasion to have recourse to any other means of interpretation."

The same idea is elaborated, *Dewey* v. *United States*, 178 U. S. 510, 520, 521:

"Of course, our duty is to give effect to the will of Congress touching this matter. But we must ascertain that will from the words Congress has chosen to employ, interpreting such words according to their ordinary meaning as well as in the light of all the circumstances that

may fairly be regarded as having been within the knowledge of the legislative branch of the Government at the time it acted on the subject."

* * * * * * *

"Here, the language used by Congress is unambiguous. It is so clear that the mind at once recognizes the intent of Congress. Interpreted according to the natural import of the words used, the statute involves no absurdity or contradiction, and there is consequently no room for construction. Our duty is to give effect to the will of Congress, as thus plainly expressed. *United States* v. *Fisher*, 2 Cranch, 358, 399; *Lake County* v. *Rollins*, 130 U. S. 662, 670."

There is nothing in the general intent of this act to require a construction other than that authorized directly by its terms. The hardship of the pre-existing law was that an officer might exercise the duties of a higher command and receive the pay appropriate to less responsible duties. To make the remedy commensurate with the mischief, every officer when exercising a command above his grade should have the pay of the higher command.

The first decision of the Controller of the Treasury, quoted hereafter, pp. 18, 19, gave to the law this complete remedial effect, holding that the general provisions of Army Regulations, conferring command upon the senior officer present in the absence of the appropriate commander, was a compliance with this statute.

He later ruled—and we need go no further for the purposes of this case—that the remedy intended by this statute did not extend to the exercise of brief or casual periods of higher command where the appropriate superior found it unnecessary to issue a particular order therefor. He held that the intent of the statute was fulfilled and its terms literally complied with by giving the higher command pay only when a special order was

issued by proper authority for the exercise of the higher command.

Either of these decisions is reasonable and either carries out the general intent of the statute. That general intent is defeated by a construction which denies higher command pay to all officers exercising higher command under orders unless they can show that it would not have been exercised by them without such orders.

The Defendant's Position.

The only ground suggested against the right to the higher pay is that, in the absence of the captain and first lieutenant, the claimant, as second lieutenant, would have succeeded by virtue of his office, to the command of the company without any special assignment to that duty, and that the assignment was therefore unnecessary.

This defense was suggested by an *obiter dictum* of the Court of Claims in the case of *Humphreys* v. *United States*, 38 C. Cls. 689. That case involved only the question whether a major could receive higher pay for exercising the command of a lieutenant-colonel. The court decided that he could not, a conclusion resting upon the fact that under section 14 of the Army Regulations quoted in the brief for the United States, p. 8, there is no difference between the commands of those two grades.

The court took the position, unnecessary to the decision of that case, that "orders" in the act of 1898 means only such orders as would be absolutely necessary to authorize an officer to take the higher command. Orders issued by a superior in the exercise of his discretion naming the senior officer present for the higher command, are held not to be "orders" contemplated by the statute. An assignment by such orders, it held, gave no right to additional pay, since the higher command would

have been exercised without such orders. The court's opinion is quoted in the defendants' brief, p. 16.

There are two objections to this theory of the law.

The first is that there is nothing in the statute which warrants it. The test exprest in the statute is the existence of orders. The only implied condition is that the orders must be lawful. Their propriety under existing military conditions in any given case is a matter of discretion in the military officer. Whenever the higher command exercised by an inferior officer continued so long, or such other conditions existed, as to make orders proper in the view of the superior officer, then, the statute says, the higher pay must be allowed. When the duration of a command was so brief, or the conditions otherwise such, that an order was not deemed essential by the superior officer, then the higher pay is not granted. The right to the higher pay is made dependent by the statute upon the issuance of lawful orders. It authorizes no inquiry into the administrative or military propriety of their issuance.

The Controller of the Treasury in his first decision under this statute (5 Cont. Dec. 639, quoted, *post*, pp. 18, 19) declared a more liberal rule than this. He held that even if a subaltern exercised the command of his company without any special assignment under the general provisions of Army Regulations, he would still be entitled to the higher pay. The intent of the law awarded the higher pay for the increased responsibility of higher command when exercised by proper authority, whether exprest in a particular order or in a general regulation. The exercise of a higher command merely by virtue of the general provisions of regulations is a compliance with the requirement of the law that the exercise must have been "in orders issued by competent authority."

While it is true that the command of the company in the absence of the captain, devolves upon the subaltern next in rank who is serving with it (Army Regulations of 1895, par. 253), unless otherwise specially directed, it is, nevertheless, not usual and not in accordance with the best military practice for such temporary command to continue for periods of any great length without special assignment in orders. Whether such orders shall be issued or whether the assignment shall be left to devolve upon the subaltern merely by virtue of his rank are questions of administration on which courts will not overrule the action of the administrative authorities without some special reason for so doing.

The second reason against the government's position is that the adoption of such a rule would leave practically nothing for the operation of this statute. It is a very unusual military condition for an officer to be ordered to any command, even temporarily, which he would not exercise in order of seniority. The military rule is that when the commanding officer is absent the senior officer present takes command. A junior officer is practically never assigned to command over his senior officer; nor are company, regimental or brigade officers often transferred to other commands for the purpose of superseding the senior officer there present. Such a condition would arise only in case of gross incompetency and would necessarily involve censure.

The frequency with which the command is conferred by orders upon the senior officer present as a matter of military administration may be seen by the cases decided by the Controller and by the Court of Claims as reported. Payments were authorized to lieutenants commanding their own companies and batteries by the Controller, 6 Cont. Dec. 187, 7 Cont. Dec. 475, and to captains commanding battalions in their own regiments, 9 Cont. Dec. 528.

This very case illustrates the same principle.

The fact of seniority appears on the record in the case decided by the Controller, of John T. Martin, First Lieutenant of Artillery in command of battery, 6 Cont. Dec. 187. In the case of Colonel William J. Glenn, who was paid as Brigadier-General, by judgment of the Court of Claims (*Glenn* v. *United States*, 37 C. Cls. 254), the order itself recites that he is assigned to the command of the regiment because he is the senior colonel present.

It is surely not necessary in order to entitle an officer to increased pay for exercising a command above that pertaining to his grade, that the command shall be one outside of his own company or regiment, or that he shall, contrary to all military usage and tradition, be assigned to command over an officer superior in rank to himself. The statute must be interpreted in accordance with military usage.

Practice Under This Statute.

The Controller of the Treasury considered the question whether an officer succeeding to a command by virtue of his office under the Army Regulations, without any special order, would thereby become entitled to the increased pay for exercising a higher command. This is the decision of the Controller of March 31, 1899, referred to in the concluding paragraph of Finding II in this case, Record, p. 4. He said (5 Controller's Decisions, 642):

"While the question whether the exercise of a higher command in accordance with law and the general regulations issued in pursuance thereof could be regarded as an exercise of the command 'under orders issued by competent authority,' within the meaning of the act, was not specially discussed, it was covered, in principle, by the decision that the form of the order is not material, but that 'it must be an order which the subordinate officer was bound to obey.'

"Except as they embody law, the Army Regulations

now in force are substantially a compilation of general orders.

"If, therefore, an officer of a certain grade is required by the Army Regulations, upon a specified contingency, to assume and exercise a command above that pertaining to his grade, I am of the opinion, coinciding with the views of the Acting Judge-Advocate, that while exercising such higher command he must be regarded, under the law, as exercising it 'under assignment in orders issued by competent authority.'

"If the general order clearly requires a particular officer to exercise the higher command, it has the same effect as a special order assigning him to the command by name." (5 Controller's Decisions, 642.)

This decision is right, altho this case does not require so broad a rule.

In a later decision of February 27, 1901, 7 Controller's Decisions, 469, 470, the Controller modified this ruling, by holding express orders in the particular case to be necessary to the operation of the statute. He says (7 Cont. Dec. 469–70):

"It is perfectly clear to my mind that Congress intended to attach a substantial meaning to these restrictive words —in fact, the most restrictive clause in the entire act—and that its meaning does not appear to be difficult to arrive at. It is that when an officer is absent, and the officer having authority to designate another officer to temporarily fill his position determines that the absence is of such a character as justifies an official filling of the position so temporarily vacant, and does so fill it by ordering some other officer to exercise the command, then the requirements of this clause of the law have been fulfilled."

The Court of Claims itself decided a case on the same principle, that of *Glenn* v. *United States*, 37 C. Cls. 254, where the claim was that of a colonel for the pay of a brigadier-general by virtue of commanding his own brigade, he being the senior officer present.

Under these decisions, all officers exercising similar commands were paid at the rate appropriate to the higher grade, either by the pay department of the Army, or through the proper accounting officers of the Treasury. (Concluding sentence of Finding II, Record, p. 4.)

These rulings remained in force, and nearly all officers entitled had been paid under them when, on May 25, 1903, the Court of Claims in the course of its opinion in the case of *Humphreys* v. *United States*, 38 C. Cls. 689, used the language quoted in the brief for the United States, p. 16, which threw some doubt in the minds of the accounting officers upon the correctness of nearly all payments made under the act.

The Court of Claims, in its opinion in this case, has receded, we submit, very properly, from its dictum in the Humphreys case, and has returned to the rule enunciated by the Controller in 1899, and steadily acted upon for the four years following.

These circumstances bring the case amply within the rule of contemporaneous construction announced and acted upon by this court in *United States* v. *Finnell*, 185 U. S. 236, 243, 244, and numerous cases there cited. To overturn that construction at this late day and require the repayment of pay received in good faith for services rendered in a higher grade by a large number of officers would work great injustice.

Authorities for this Construction.

There have been decisions under several previous statutes of similar character as well as decisions under this very statute. To these we will now refer.

Attorney-General Wirt, construing in 1821 an act allowing pay to brevet officers "when on duty and having a command according to their brevet rank," held that a brigadier-general holding a commission as brevet major-

general, was entitled, while commanding a division, the appropriate command of a major-general, to major-general's pay, and this altho the general officers of the Army at that time were only one major-general and two brigadier-generals. He hence held that as both of the brigadier-generals were commanding divisions, they were entitled to major-generals' pay. 1 Opinions of Attorneys-General, 525.

This view was reaffirmed in 1836 by Attorney-General Butler, 3 Opinions Attorneys-General, 83.

Attorney-General Cushing in 1853, thus treated the objection suggested by the Court of Claims as quoted in the brief for the United States, p. 19, that the law permitted duplication of pay:

"The acting Paymaster-General assumes that the paragraphs 1247 and 1253 of the Regulations for the Army, with the fact that General Harney was, for the time being, in command of the Eighth Department, preclude General Smith from receiving pay and emoluments according to his brevet rank of major-general: to which the late Secretary of War adds another suggestion, that the two officers, General Smith, as brevet major-general, and General Harney, as brevet brigadier-general, can not both receive brevet pay for the same command at the same time.

"I do not regard the latter consideration as being entitled to the weight assigned to it, apparently, in the mind of the Secretary. The two persons are distinct, and so are their commissions, their grades, and their services. There is nothing of legal incompatibility in the idea that both may be in command at the same time in the same military department, and each entitled to his appropriate pay and emoluments, according to their relative grades and ranks in the Army. Even in civil employments it often has happened, and must oftentimes happen again, that two different persons will be, at the same period, in the same office temporarily, and each entitled to the salary established by law for the same office. It must of necessity be so in a territory so extensive as that subject to the

jurisdiction of the Government of the United States. Otherwise, there would, from time to time, arise absolute cessation of government, as while a territorial governor, judge, or marshal, or a foreign minister is in transit from the place of appointment to the place of service. There is no act of Congress to preclude this, and the very contingency has been considered, and the legality of such a temporary duplication of officer and salary affirmed, in the courts of the United States. (*Bowerbank* v. *Morris*, Wallace, p. 124.)" 6 Opinions, 214.

By act of March 2, 1827, 4 Stat. L. 227, it was provided:

"That every officer in the actual command of a company in the Army of the United States shall be entitled to receive $10 per month additional pay as compensation for his duties and responsibilities," etc.

This act was recognized by Congress as in force during the Civil War by the Act of June 15, 1864, 13 Stat. L. 127, but seems to have been omitted from the Revised Statutes, being probably regarded as superseded by the general terms of the new pay table contained in section 24 of the Act of July 15, 1870, 16 Stat. L. 320.

There is a long line of departmental decisions under this act as well as under the one giving the higher pay to a brevet officer when exercising command according to his brevet rank, Digest Second Controllers' Decisions, Vol. 1 (1817–1869) §§ 1176–1205, Titles, "Allowance to Commanders of Companies" and "Brevet Pay." All of them hold the statute satisfied by an exercise of the command by proper authority general or special.

The statute of 1898 giving increased pay for exercising a higher command is thus simply in line with a general policy of long standing exprest, as has been seen, in several different statutes.

Conclusion.

For the reasons stated, the judgment of the Court of Claims should be affirmed.

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Supreme Court of the United States.

No. 180.—October Term, 1906.

The United States, Appellant, vs. Donn C. Mitchell. } Appeal from the Court of Claims.

[March 18, 1907.]

The Court of Claims filed the following findings of fact and conclusions of law:

"I. The claimant, Donn C. Mitchell, was enrolled in the Volunteer Army, during the Spanish war, as second lieutenant of Troop E, First Ohio Volunteer Cavalry, on the 3d day of May, 1898. He served in the grade of second lieutenant until promoted to first lieutenant October 20, 1898. He was mustered out as first lieutenant October 23, 1898. His entire service was within the limits of the United States.

"II. While on duty as second lieutenant of the First Ohio Volunteer Cavalry at Huntsville, Ala., during the Spanish war, claimant received the following order:

'Headquarters 1st Ohio Volunteer Cavalry,
Camp Wheeler, Huntsville, Ala., August 24, 1898.

Special Orders, No. 44.

'I. 1st Lieut. William D. Forsyth, 1st Ohio Volunteer Cavalry, having been ordered before a board for examination for appointment as second lieutenant in the Regular Army, is hereby relieved of the command of Troop E. He will turn over the property, funds, and records of the troop to his successor.

'II. 2d Lieut. Donn C. Mitchell, 1st Ohio Volunteer Cavalry, is hereby appointed to the command of Troop E. He will receipt to Lieut. Forsyth for the property and funds pertaining to the troop.

'By order of Lieut. Col. Day:

(Signed) A. C. Rogers,
Captain and Regtl. Adj. 1st Ohio Vol. Cav.'

"This order was approved by the commanding general in the field in the following orders:

'Headquarters Fourth Army Corps,
Camp Wheeler, Huntsville, Ala., September 2, 1898.

Special Orders, No. 97.

* * * * * *

'II. It appearing from evidence that the following-named officers of the First Ohio Volunteer Cavalry have exercised the functions of com-

manders above that pertaining to the grades held by them from and after the dates set opposite their respective names, the assignment thereto contemplated by General Orders, No. 86, current series, Adjutant-General's Office, is confirmed, namely:

* * * * * *

'2d Lieut. Donn C. Mitchell, as captain, from August 24th, 1898.

* * * * * *

'By command of Major-General Coppinger:

(Signed) CLARENCE K. EDWARDS,
Assistant Adjutant-General.'

"Under these orders claimant exercised command of Troop E from August 26, 1898, to October 23, 1898, when he was mustered out with his regiment.

"So much of G. O. No. 86, A. G. O., of 1898, as relates to the matter of pay for exercising a higher command, is as follows:

General Orders, No. 86. } 'Headquarters of the Army,
Adjutant General's Office,
Washington, July 2, 1898.

'I. In section 7 of the act 'For the better organization of the line of the Army of the United States,' approved April 26, 1898, it is provided 'That in time of war every officer serving with troops operating against an enemy who shall exercise, under assignment in orders issued by competent authority, a command above that pertaining to his grade, shall be entitled to receive the pay and allowances of the grade appropriate to the command so exercised.'

'The Attorney General has held that this clause 'was intended to apply to all instances where the troops of the United States are assembled in separate bodies, such as regiments, brigades, divisions, or corps, for the purpose of carrying on and bringing to a conclusion the war with Spain,' but that 'all service in the Army at the present time is not to be considered as operating against an enemy. Troops and their officers on the western frontiers, performing the same service as garrisons which is requisite in time of peace, and in no wise considered a part of the Army assembled to carry on the war with Spain, would not be within the meaning of the act.

'To entitle an officer to the pay of a grade above that actually held by him the assignment in orders under the clause cited must be by the written order of the commanding general in the field or the Secretary of War, and no pay or allowances of a higher grade than that actually held by an officer will be paid under this provision except when a certified copy, in duplicate, of such order, with statement of service, is filed with the paymaster. . . .'

"General Orders, No. 86, was amended by General Orders, No. 155, dated September 27, 1898, by striking out the above portion of the order, and on the same date Circular No. 18, promulgating this order, was amended by striking out the portion above quoted and inserting in lieu thereof the following language, to wit:

'To entitle an officer to the pay of a grade above that actually held by him under section 7 of the act of Congress approved April 26, 1898, he

must be assigned in orders issued by competent authority to a command appropriate to such higher grade of troops operating against the enemy.' (Circ. No. 39, A. G. O., Sept. 27, 1898.)

"At the time that he assumed and during the time that he exercised command of troop E he was the senior officer present with the troop.

"The Treasury Department, from the decision of the Comptroller of March 31, 1899 (5 Comp. Dec., 641), to the decision of the court in the Humphreys case (38 C. Cls. R., 689), on May 25, 1903 (pp. 15–16), recognized this sort of orders, so subsequently confirmed, as sufficient authority for the higher pay. Under similar orders, subsequently affirmed, all officers were paid either by the Pay Department or by the Treasury Department in claims presented after the war.

"III. From August 26, 1898, to October 19, 1898, claimant was originally paid the rate due a second lieutenant of cavalry, and from October 20 to October 23, 1898, he originally received the pay of a first lieutenant of cavalry. He subsequently filed a claim for additional pay for command of the troop and was paid by the Auditor for the War Department, October 30, 1899, the pay of a captain for the entire period from August 26, 1898, to October 23, 1898.

"IV. On the 14th day of September, 1898, a furlough of thirty days for said regiment was authorized under General Orders, No. 130, A. G. O., 1898, and amendatory circulars. The above-named claimant did not receive such furlough. From the beginning of the furlough to September 26, 1898, the said claimant was sick in Mount Carmel Hospital, Columbus, Ohio. From September 26, 1898, to the end of the furlough period he was detained for duty and actually performed duty. During the whole furlough period he was at all times subject to the orders of his superior officers until final muster out. Claimant was first taken sick at Huntsville, Ala., before the furlough, but accompanied his regiment to the home station at Columbus, Ohio, where he was placed in the hospital by officers of said regiment, the surgeon being absent. While at the hospital claimant performed some military service by directing a clerk employed by him for that purpose.

"V. If claimant is entitled to retain the pay already received by him, the amount due him as extra pay at the rate due a captain, mounted, is $166.66.

"If entitled to extra pay at the rate due a second lieutenant, mounted, the amount due is $125.

"If entitled to extra pay and not entitled to retain the pay of a captain as stated in finding 3, there should be deducted from the extra pay allowed the sum of $79.44."

The court rendered judgment for the claimant in the sum of $166.66. 41 Ct. Cls. 36.

Mr. Chief Justice FULLER delivered the opinion of the Court:

It is conceded by the Government that claimant is entitled to extra pay, so that the question is to what amount. Was he entitled to receive one month's extra pay of a captain of cavalry mounted ($166.66) or one month's extra pay of a second lieutenant of cavalry mounted ($125)?

We lay out of view the suggestion that if claimant were entitled to the extra pay of a second lieutenant of cavalry only, then that a certain sum or sums ought to be deducted as having been previously improvidently paid by the Auditor for the War Department. The United States filed no set-off or counter claim, and we think we cannot overhaul the allowance by the Auditor for the War Department in the circumstances. Such payment, if made in error, did not determine the question before us within *United States* v. *Hite, ante,* p. .

The claim is made under section 7 of the Act of April 26, 1898, 30 Stat. 364, 365, c. 191, reading as follows: "That in time of war every officer serving with troops operating against an enemy who shall exercise, under assignment in orders issued by competent authority, a command above that pertaining to his grade, shall be entitled to receive the pay and allowances of the grade appropriate to the command so exercised."

The main question is whether claimant exercised, "under assignment in orders issued by competent authority, a command above that pertaining to his grade?" When he assumed command of his company, August 26, 1898, he was the senior officer present, the captain and the first lieutenant being absent. Section 253 of the Army Regulations of 1895, then in force, provided: "In the absence of its captain, the command of a company devolves upon the subaltern next in rank who is serving with it, unless otherwise specially directed."

This embodied the rule of succession by seniority prevailing in the ordinary course of military affairs, while, at the same time, it recognized that there might be exceptions, in respect of which special direction was required, and section 7 of the Act of April 26, 1898, applied to such cases.

The exceptions spring from necessity, and where it is apparent that that does not exist, orders relied on as the basis for increased pay under section 7 are ineffectual for that purpose.

In *Humphreys* v. *United States,* 38 Ct. Cls. 689, the Court of Claims held that what the law contemplated was "necessary and not gratuitous assignments, and only such as would be for the good of the service and the vigorous prosecution of the war." Chief Justice Nott, speaking for the court, said: "It seems to the court incontrovertible that the words 'under assignment in orders issued by competent authority' constitute the controlling limitation of the statute; and the limitation implies that the benefits of the statute extend only to cases where such an order is necessary to impose the burden of the higher command upon an officer." We concur in that view, and tested by it, Special Orders No. 44, dated August 24, 1898, whereby the lieutenant colonel of the First Ohio Volunteer Cavalry announced that First Lieutenant Forsyth was relieved of the command of

troop E, and, as incident thereto, that Second Lieutenant Mitchell was appointed to the command, cannot be considered as an "assignment in orders issued by competent authority," within section 7. That section was not enacted to give increased pay for the discharge of the ordinary duties of the service, but to give compensation for the greater risk and responsibility of active military command, and no assignment in orders when unnecessary to that end can make a case within the statute. *Truitt* v. *United States*, 38 Ct. Cls. 398, 406; *Parker* v. *United States*, 1 Pet. 293, 297. Here the additional duties discharged by Lieutenant Mitchell were "the ordinary incidental duties of military official life which go with such officer's commission." 38 Ct. Cls. 692.

The attempted confirmation by Special Orders No. 97 must fail of effect under section 7 for like reasons.

Other questions argued at the bar need not be discussed.

Judgment reversed and cause remanded, with a direction to enter judgment in favor of claimant for $125.

True copy.

Test:

Clerk Supreme Court, U. S.